No. 3433

United States Circuit Court of Appeals

For The Ninth Circuit

In the Matter of PETER THOMPSON, Bankrupt.
R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt,

Appellant,

vs.

L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLEE

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THE ARGUS PRESS, SEATTLE

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On Motion To Dismiss Petition For Review.

Under the above heading opposing counsel attempts to defend his petition for revision against our motion to dismiss by deliberately misstating the nature of the judgment he has brought to this court for review. To that end he says on page 4 of his reply brief:

> "Both the referee and the District Judge have allowed the claim, the former denying participation in certain funds realized from the merchan-

> dise assets, the latter holding that the claim should be given the same rank as other unsecured claims. It is not a question of allowance or rejection of a claim or debt. It is a question of rank of a claim that has arisen in the course of the bankruptcy proceedings."

The statement that the referee allowed the claim, merely, "denying participation in certain funds" is untrue.

In quoting from the record to support his contention he has repeated, on page 7 of his reply brief, "That the question now before this court is not one of allowance or rejection of a claim, but one of classification."

Opposing counsel has been guilty of deception in the following particulars:

On page 2 of his reply brief he pretends to set forth the last order of the referee on the subject of this claim, and on page 3 he says: "The last order made by the referee (pp. 129-30) expressly holds that the claim 'is in proper form and is entitled to be filed as a claim in said estate.' "

The deception here lies in the pretense that the order as set forth on page 2 is the *complete* order. The deception lies further in the taking of the last sentence of this order as found in the record, deliberately converting a coma into a period and closing the sentence at that point as if that concluded the order, suppressing the balance of the sentence following the coma.

The deception lies also in the pretense, on page 3

and on page 6, that the preliminary recital in the emasculated order reading "I find that the claim of said L. H. Macomber, as receiver, is in proper form and is entitled to be field as a claim in said estate" constituted the allowance of the claim by the referee.

The deception continues on page 3 where opposing counsel argues: "It follows, therefore, that the question to be reviewed is the same question certified to the District Judge by the referee, viz., 'Whether or not the claim of L. H. Macomber, receiver, should be allowed . . . *to participate in the funds now in the hands* of the trustees. (p. 71).' "

Here is the proof: Taking the last order of the referee governing the allowance of the claim in controversy as quoted on page 3 of counsel's reply brief, we find the order is completed by a sentence of which the last word is "estate", concluded by a period. Turning to page 129 of the record, an examination of this same order develops that in the *middle* of the last line is found this same word, "estate", with a comma after it, not a period, and following the comma these lines complete the order, "*and the claim of the said L. H. Macomber is therefore disallowed, to which ruling the said receiver by and through his attorney, L. M. Stern, duly excepts, and his exceptions are allowed.*"

The nerve of opposing counsel is monumental, but even he would have found it embarrassing to print the true conclusion of this order, on page 3 of his brief, and to follow on page 4 with his contention that by this order the referee *allowed* the claim,

merely, "denying participation in certain funds."

Further sins of omission are found in the quotation on page 3 from the certificate of review of the foregoing order made by the referee to the District Judge. Counsel says that in this certificate the referee certified the question to be reviewed in the following words: "Whether or not the claim of L. H. Macomber, receiver should be allowed . . . *to participate in the funds now in the hands of the hands of the trustees,* (p. 71)."

Counsel's handiwork is very clever. Read as a complete sentence without reference to the text omitted or the context there may be room for contention that the question which the referee had decided and which the District Judge must decide was not a dispute over the debt or claim itself, but a question of rank or priority of the claim by reason of its character.

Turning to the certificate itself (Record p. 71) the following is found to be the true quotation, the part italicised being the part that opposing counsel preferred to represent by asterisks in his brief:

> "The question presented on this review is: Whether or not the claim of L. H. Macomber, receiver, should be allowed *as a proper claim against this estate and* to participate in the fund now in the hands of the trustee."

We will concede, as opposing counsel argues on page 3 of his brief, that the question brought here for review is "the same question certified to the District Judge by the referee"; but that question,

and the real question decided by the referee and certified by him to the District Judge, is found, not in the garbled quotation presented by opposing counsel in his brief, but it is found in that portion of the referee's language so carefully suppressed from counsel's quotation.

By the order itself, as shown above, the referee ruled that "the claim of L. H. Macomber, receiver, is therefore disallowed", and by his certificate to the District Judge, which accompanied this ruling, the referee advised that "the question presented on this review" was whether the claim "should be allowed *as a proper claim against this estate.*"

Thus we see that the first and the last ruling of the referee was that the claim should *not* "be allowed as a proper claim against this estate."

Never having been allowed as a claim *against the estate*, there was not, and could not have been, any occasion for any decision on the question of rank or classification.

Opposing counsel also attempts deception when having suppressed from his quotation of the referee's order the concluding recital, "and the claim of said L. H. Macomber is therefore disallowed," he argues on page 7 of his brief that the referee had allowed the claim by a preliminary recital in that same order reading, "I find that the claim of L. H. Macomber, as receiver, is in proper form, and is entitled to be field as a clam against said estate.

If counsel is not trying to hoodwink us in his contention that permitting a claim to be *filed* is the

same as *allowing* the same, he betrays a gross ignorance and shows himself to be disqualified to act as attorney for a trustee in bankruptcy. Knowing him to be a specialist of many years' practice in the bankruptcy courts we feel we are making ourselves ridiculous when we enter upon a discussion of a proposition so elementary as, that the *filing* of a claim is one thing, and the *allowance* quite a different step; and yet we must go on to point that under Sec. 57-c of the Bankruptcy Act claims may be proved or filed "for the purpose of allowance." After being duly proved and filed according to the farmality required by the Act, the court may then, under the authority of Sec. 57-d, *allow or* disallow the claim.

As pointed out by Collier on Bankruptcy (11th Ed.) 781, "The proof of a claim is one thing, its allowance by the court is quite a different step. When the act refers to the proof of a claim it means the deposition or statement of the creditor. When it refers to its acceptance by the court, it uses the word allowed or allowance. The distinction between proof and allowance is much the same as that between evidence and judgment. Before a claim can be regarded as proven the written proof called for by Sec. 57-n must at least have been filed or lodged with the court or some officer thereof."

After all, opposing counsel's argument as to the nature of the controversy brought here for review by the petition, is beside the mark. Under the law, appeals are brought and reviews sought, not from

incidental orders or stray remarks made by the referees in their certificates to the reviewing judge. Final decisions of the District Judge alone form the basis of a revisory petition or appeal to this Court, and the nature of the controversy can only be determined by reference to the petition for review and by an examination of the order alleged in such petition to have been erroneous, the ground of error set forth and the prayer for relief. Does this controversy involve merely the rank of the claim and not the allowance of the claim or debt itself? Has the nature of the controversy changed between the time of filing the petition for review and opposing counsel's argument against our motion to dismiss?

Let us examine opposing counsel's petition for revision. (Record pp. 44-57). After some preliminary recitals of the character of the claim as proven, the petitioner alleges that the trustee's objections were overruled, "finally culminating in the order of the said District Judge made and entered on the 24th day of November, 1919, directing that the claim of said L. H. Macomber should be filed and allowed in the above entitled estate." (Record, 53),

The petition then recites that this order was erroneous, and specifies six grounds designated by letters A to F. Each of these grounds concludes with the recital "That the District Court committed error in not disallowing the claim of the said Macomber, for the reasons above stated."

The concluding prayer of the petition for revision reads, (Record p. 57):

> "Wherefore, your petitioner feeling aggrieved because of the entry of the order of the 14th day of July, 1919, and the further order of the 24th day of November, 1919, asks that the same may be revised in matter of law by your Honorable Court as provided in Section 24-b of the Bankruptcy Law of 1898, and the rules and practice in such cases provided."

The order of July 14th, 1919, (improperly recited May 14, 1919, in Record p. 39), made by the District Judge, struck each and every one of the objections of the trustee, reversed the decision of the referee with respect to said objections and sent the matter back to the referee to make such order of "allowance of said claim as shall be consistent with this order."

The order of November 24, 1919, (Record p. 41), which the petition for revision prays be reviewed, is of course the final and real order brought to this Court for review. The substance of that order, the meat of the whole controversy, the real judgment which opposing counsel seeks to reverse, is found in the one sentence: (Record p. 43) "Ordered, that the claim of L. H. Macomber, as receiver, be and the same is hereby allowed as of the date of the entry hereof."

Is there the slightest suggestion in either the order of July 14 or of November 24, which are made the subject of the petition for revision, that the question of rank or classification was the issue

pleaded, argued or decided? Were the exhaustive objections of the trustee to the allowance of the claim based on the question of rank, or on the merit of the indebtedness as a whole?

This is answered by counsel's own statement on Page 4 of his reply brief, "That the trustee at all times insisted that the claim should be denied participation in any of the funds of the estate, regardless of the source of the funds."

And since both the petition for revision and the petition for appeal seek to bring the same subject matter to this Court for review,—the trustee pursuing both methods because he was not certain which was the proper course—it becomes pertinent to refer to his petition on appeal, and to learn therefrom what opposing counsel designates as the real issue in this litigation. On page 78 of the record is found his petition on appeal, wherein he sets forth that the court on the 24th day of November, 1919, "entered an order in said proceedings allowing the claim of one L. H. Macomber, as receiver, in the sum of $8500, as a general claim against the above entitled bankrupt's estate, and that in the entirety of said order, or that part thereof allowing said claim, certain errors were committed to the prejudice of the trustee herein."

And in the concluding paragraph of the assignment of errors accompanying his petition on appeal, opposing counsel recites; (Record, p. 85):

> "That the Court erred in directing that the said claim should be allowed as shown by its

> order of November 24, 1919. Wherefore said trustee of the above-named bankrupt prays that the said decision and judgment order be reversed, and that the District Judge may be directed to enter a decree and judgment expunging said claim of the said L. H. Macomber and disallowing the same in its entirety."

In his brief, styled Appellant's Brief, opposing counsel makes the following opening statement of the nature of the controversy before the Court:

> "L. H. Macomber as receiver of the Peter Thompson Company, a corporation, is seeking to have allowed a claim of approximately $8500.00 against the estate of Peter Thompson, an individual, growing out of an alleged liability on the Peter Thompson stock subscription. The claim has been allowed by the Disdrict Judge (pp. 41-43)."

Let us also look at counsel's original brief on petition for revision. It contains 39 pages. His statement of the case says nothing on the subject of rank or classification of the claim. The concluding paragraph of thise statement simply tells of the final order of Nov. 24, 1919, allowing the claim (p. 2), and the first paragraph of the argument (p. 3) reads as follows:

> "It was the contention of the trustee below, and it is here, that the claim of said Macomber is not entitled to participate in the estate of the bankrupt for six different reasons, (pp. 120-6)."

On page 4 of his original brief and argument, counsel points out that "the rulings of the District Court complained of are set forth in the petition for revision, and numbered A to F inclusive."

We have heretofore shown that the errors claimed in the petition for revision and lettered A to F involved only the merit of the claim itself, and made no mention whatsoever of the question of rank or classification.

Counsel's whole brief of 39 pages is an exhaustive argument in support of his six separate objections to the claim, each of which objections, as we have said, goes to the allowance of the claim or debt itself, and not to the matter of rank or classification. We have read the petitioner's brief several times and cannot find the slightest reference to the question of rank or classification. In fact, we feel sure that not even the words "rank" or "classification" appear in the course of the entire brief.

In short, we state it as absolutely a fact, that this question of rank or classification was never an issue in the entire history of this case. It was never raised in the pleadings. It was never argued by counsel or considered either by the referee or the District Judge. It is not even remotely referred to in any of the orders sought to be reviewed, or in the petition for revision or in the brief of the peitioner.

Paraphrasing opposing counsel's argument on page 4 of his reply brief, we say of the controversy here: "It is a question of the allowance or rejection of a claim or debt. It is *not* a question of rank of a

claim that has arisen in the course of the bankruptcy proceeding."

We take no issue with Judge Lurton's opinion In re Mueller, 135 Fed. 711, quoted on page 6 of the reply brief, holding that a petition for revision will lie when "the debt or claim is not disputed, and the only question sought to be reviewed is one of rank, or priority of the claim by reason of its character."

Nor do we take issue with any of the authorities cited on this same proposition. Our only reply is that the *debt or claim* in the case at bar is in dispute, and the question of rank is *not* "the only question sought to be reviewed."

In passing, we might remark that the converse of the rule announced by Judge Lurton is also true, viz., that when the question of the rank or priority of the claim by reason of its character is not the only question to be reviewed, *but the debt itself is also disputed*, appeal under Sec. 25-a is the proper method in determining the whole controversy. See Remington on Bankruptcy (2nd Ed.), Sec. 2901 and cases thereunder cited.

On Motion To Dismiss The Appeal.

We find it difficult to follow opposing counsel's argument on the issues raised by our motion to dismiss. Like the ubiquitous flea he will not stay "put," but hops from one issue to another. In answer to our motion to dismiss the appeal because taken too late, he now argues, on page 8 of his reply brief, that this controversy is appealable under Sec. 24-a; that it is reviewable under Sec. 24-b; and that it is appealable under Sec. 25-a.

Having vigorously contended that the petition for revision under 24-b was the proper method of review, he now seems to argue that this matter may properly come before this Court by appeal under 24-a.

But this is not "a controversy arising in bankruptcy proceedings," within the province of Sec. 24-a. That section refers only to controversies *outside* of bankruptcy proceedings, as a suit between the trustee and an adverse claimant. When the subject matter and object of the proceedings are within the power to make a summary order, it is a proceeding *in* bankruptcy proper, and not arising outside of the bankruptcy proceedings, and hence reviewable either under Sec. 24-b or appealable under Sec. 25-a, but not under 24-a.

The distinction is pointed out in Collier on Bankruptcy, (11th Ed. page 563):

> "(2) Controversies Arising in Bankruptcy Proceedings.—The words "controversies in bankruptcy proceedings" in subsection *a* of this

section, and the words "in bankruptcy proceedings" in the next section refer to different classes of cases; the former referring only to controversies outside of the bankruptcy proceeding proper, as suits between the trustee and adverse claimants. Nothing can be regarded as a "controversy arising in bankruptcy proceedings" within the purview of subsection *a* where the subject matter and object of the proceedings are within the power to make a summary order; certainly this is true where plenary action is not sought. As stated by the Supreme Court: "Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect to which special provision thereof was required, while Sec. 24-a relates to controversies arising in bankruptcy proceedings in the exercise of the jurisdiction vested in them at law and in equity by Sec. 2, to settle the estates of bankrupts, and to determine controversies in relation thereto." Controversies arising in the course of bankruptcy proceedings involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the trustee or receiver, or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate

to be distributed ultimately among general creditors. As where a controversy arises in respect to the claim of an adverse claimant in respect to a fund in the hands of the trustee as a result of a suit in the State court to recover property conveyed by the bankrupt in fraud of his creditors, it is a controversy arising in bankruptcy and is appealable under subsection *a* of this section. Such orders and decrees as are in the nature of independent suits and controversies, arising in the course of bankruptcy proceedings are reviewable on appeal or writ of error, as the case may be, under subsection *a* of this section.

"(4) Distinction Between Controversies Arising in Bankruptcy Proceedings and Bankruptcy Proceedings.—There is a clear distinction between such controversies and "proceedings in bankruptcy", within the meaning of section 25-a; the latter, broadly speaking, covering questions between the alleged bankrupt and his creditors as such, commencing with the filing of the petition, ending with the discharge and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, proof and allowance of claims, and other similar matters to be disposed of summarily, all of which naturally occur in the settlement of the estate. The great number of authorities upon this branch of bankruptcy practice and the conflict between

> them has given rise to endless confusion, and it is some times difficult to determine within which class a particular order of the bankruptcy court may fall. Each case will necessarily be determined by its own facts, and in each the important consideration is the object and character of the proceeding sought to be reviewed."

In the course of his argument counsel again distorts the record when he says, on page 17 of his brief: "As pointed out heretofore, we are not now concerned with the question of a rejection or allowance of a claim of $500.00 and over. The referee has allowed the receiver's claim, but refused to allow it participation in the funds then in the hands of the trustee."

As we have shown in previous arguments, the referee did not allow the claim, but disallowed it by the terms of that portion of his order which opposing counsel deliberately suppressed because it would show the disallowance.

This is a controversy over an order made in the bankruptcy proceeding proper. It involves a claim of over $500, duly filed and proven and allowed by the District Judge. The order was made in a summary proceeding in the course of the settlment of the estate. The relief sought by the trustee in this Court and the nature of the controversy can not be better shown than by reference to the concluding prayer of the trustee's petition for appeal, wherein he prays the Court to reverse the judgment of the District Court and to direct him to "enter a decree

and judgment expunging said claim of said L. H. Macomber and disallow the same in its entirety." (Record p. 85). Such a controversy cannot be brought here by appeal under Sec. 24-a, and the very cases cited by opposing counsel support our position.

In re Doran, cited on page 14 of the reply brief, as "not unlike the present controversy", involved a controversy in which the claim for the debt itself was never in dispute, but a lien right under the claim, only, was disputed, and the decision under the claim of *lien* was held to be reviewable in the Circuit Court by appeal under Sec. 24-a. And the ground for this decision was that *the claim itself being allowed*, no appeal under Sec. 25-a would lie, but, said the Court, had the debt been disputed, the only method of review of the debt itself, as well as incidental questions of its right to priority, in the Circuit Court, would have been by appeal under Sec. 25-a.

In re Dressler Producing Co., quoted at length on page 15 of counsel's brief, expressly holds that the "allowances of claims" coming under the head of bankruptcy proceedings proper, in the course of settlement of estates, is reviewable by appeal under Sec. 25-a, and is not an controversy arising in bankruptcy appealable only under Sec. 24-a.

Furthermore, we fail to find that any attempt was ever made by opposing counsel to bring this matter to this Court by appeal under Sec. 24-a. As stated by him on page 2 of Appellant's Brief, "the trustee

has both appealed and filed a petition for revision under Sec. 24-b of the Bankruptcy Act of 1898." In other words, he has brought this matter to this Court in two ways only, one by petition for revision under 24-b, and the other by appeal under 25-a, which latter appeal was taken within ten days after the order of Nov. 24, 1919, which opposing counsel contends to be the final and valid order of allowance of the claim.

This propostion that he has properly come into this Court to review the order of Nov. 24th under the provisions of Sec. 24-a is an after-thought on the part of counsel. He never contemplated such appeal when he prepared his record and did not take an appeal under that section of the Act. He is in this Court, as we have pointed out, and as he himself has always heretofore contended, merely upon his petition for revision and upon his appeal under Sec. 25-a.

Should The Appeal Have Been Taken Within Ten Days.

Here again opposing counsel pursues his policy of misrepresentation. On page 21 he says, "*The Court granted a rehearing.*" In making that statement he has reference to his petition for rehearing of the order of Sept. 30, 1919, allowing the claim. And on page 23 he again says, "the fact that the Court granted the rehearing . . . " And later, on the same page, he argues that "if the petition for rehearing had been a 'pretense' the Court would

have refused to consider the same," which, of course, is again an insinuation that the Court acted favorably on his petition for re-hearing. But on the very same pages on which counsel made three audacious statements, to-wit.: on pages 22 and 23 of his brief, he has caused to be reproduced the order of Nov. 24, 1919, by which the court disposed of his petition for rehearing, and we find therein the following conclusion to the order: *"It is further ordered that the petition for rehearing be denied."*

Does the word denied mean granted? That is certainly the way opposing counsel defines it.

As we have shown, the Court by its order of Nov. 24th absolutely and unqualifiedly denied the petition for rehearing. Such being the case, what is the use of the lengthy citations made by opposing counsel on the proposition that a District Judge has a right to grant a petition for rehearing which was filed in good faith and seasonably, and that the time for appeal begins to run from the time judgment was rendered after upon the petition for rehearing?

The rehearing on the merits having been denied, the sole basis for vacating the order of Sept. 30th was not to re-consider the subject on its merits, but, as frankly stated by the Court in its order, the original order of Sept. 30th was vacated in order to relieve the trustee of the consequences of his neglect to appeal from that order within ten days.

It is questionable whether the Court had the right to vacate the order after ten days to reconsider the merits of the claim. There may be authority found

both ways on this point, but there is no question, and no authority has been cited by opposing counsel, that the Court below had the right to indirectly enlarge the statutory time for appeal by vacating the final order after ten days, and re-enter a new order to precisely the same effect, in order to give the losing party ten days from the last order in which to appeal. If the Court can do this once, it can do it several times, extending the statutory period of ten days to any limit within the pleasure of the Court.

Further discussion on this point would be a waste of time. We rest the matter on our argument in our original brief.

On The Merits.

We are not sure that he have the right to reply to this part of opposing counsel's brief. But in any event wo do not find anything that merits any serious consideration.

We deny his statement on page 35 of the reply brief, that the entire record of the State Court is a part of the record in this case. Only such part of that record as was of record in the Court below when the claim was filed and when the objections thereto were considered, is properly a part of the record here.

It was not until Oct. 2, 1919, that counsel filed in the Court below an affidavit to which was attached as an exhibit certain proceedings of the State court,

to which he now takes exception. (Record p. 62).

This claim in controversy had been litigated and allowed over the objection of the trustee's counsel long before the affidavit and exhibits above referred to had been filed. Not having urged these alleged errors in the record of the State court, seasonably in the Court below, he cannot now urge them here.

The questions of the appearance by the trustee and the nature of the issues tried out by the State court in the receivership case are concluded by the certified record of the State court which was attached to the proof of claim, and mere denials of this record by counsel in his reply brief of the truth of these recitals, and challenges on his part that claimant's counsel deny this or that statement, only show the extreme to which he is driven in defending his position.

This case must be decided in this Court upon the same record of the State court, which was before the Court below at the time it made its final order of Sept. 30, 1919, allowing the claim. Any attempt to contradict that record by filings or objections made subsequent to Sept. 30, 1919, either in the Court below or here, cannot be entertained.

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